IN THE UNITED STATES SUPREME COURT

No. 75-5511

BERNARD INO BUTLER,
Petitioner,

V.

STATE OF ALABAMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS.

WM. J. FULLER, JR.
242 Washington Street,
Montgomer, Alabama, 36104,
Attorney for Petitioner.

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Petitioner,

V.

STATE OF ALABAMA,
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PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS.

The petitioner, Bernard Ino Butler, prays that the Supreme Court will grant the Writ of Certiorari to the Alabama Court of Criminal Appeals, to review the opinion and judgment of that Court, rendered on May 27, 1975, in the above entitled cause, that Court's case No. 3 Div 335, affirming the conviction and twenty (20) year penitentiary sentence imposed on the petitioner in the Circuit Court of Montgomery County, Alabama.

CITATIONS TO OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals in the case hereby sought to be reviewed, entitled: *Butler v. State*, is reported in 316 So 2d 348, 55 Ala App..... Rehearing, denied, June 17, 1975. The Alabama Supreme Court's denial of certiorari, without written opinion, is reported in 316 So 2d 355, 294 Ala ....., dated July 31, 1975. The opinion and judgment of the Alabama Court of Criminal Appeals, denial of rehearing and the Alabama Supreme Court's denial of Certiorari are fully set-out in the Appendix, along with order of the Alabama Court of Criminal Appeals, dated August 7, 1975, staying its judgment of affirmance, for ninety (90) days from July 31, 1975, in order to permit the filing of this petition in the Supreme Court.

JURISDICTION

The jurisdiction of the Supreme Court is sought to be invoked under 28 U. S. C. Section 1257 (3), on the Constitutional questions hereinafter contained, as involving the denial of the substantial rights of an accused in any criminal case. The Alabama Court of Criminal Appeals has final jurisdiction in criminal cases in Alabama, subject to review by certiorari, only, by the Alabama Supreme Court, the state's court of last resort. The Alabama Court of Criminal Appeals rendered the opinion sought to be reviewed, on May 27, 1975, contained in the Appendix. That court denied rehearing on June 17, 1975 and the Alabama Supreme Court denied certiorari on July 31, 1975, both without written opinion, and which left in effect as the judgment of the state's court of last resort, the opinion of the Alabama Court of Criminal Appeals, that court's case No. 3 Div. 335, dated May 27, 1975, contained in the Appendix, in full. Also included in the Appendix is the order of the Alabama Court of Criminal Appeals suspending the execution of its judgment affirming petitioner's twenty (20) year sentence to the penitentiary, for ninety (90) days from July 31, 1975, the date the Alabama Supreme Court denied certiorari.

QUESTIONS PRESENTED

(1.) Where State law provides that no felony conviction can be had on the uncorroborated testimony of an accomplice, and the State has shown on direct examination of the prosecuting witness that such witness was a paid participant in the alleged offense (a felony), as well as being a capital offense under State law (carnal knowledge) and the trial court summarily cuts-off all cross-examination of the prosecutrix as to her admitted prostitution and confinement in juvenile detention as a prostitute, ruling that no corroboration of her testimony was required, regardless of the State law to the contrary, maintaining this position throughout the trial, as a result of which the jury found the defendant guilty as charged and fixed his punishment at long term (20 year) penitentiary confinement, is this a denial of an accused's right of confrontation under the Sixth Amendment and of equal protection under the law of the State in which he was tried, under the Fourteenth Amendment?

(2). Where the accused elects not to testify, in a criminal case, and the trial court, never-the-less, permits the arresting officer to testify, over due objection, in the presence of the jury,

that while the accused was undergoing custodial examination, after being advised of his *Miranda* rights, he refused to make a statement as to the charge on which he had been arrested until permitted to consult an attorney (not then allowed), after the trial court had been made aware of what had transpired with the jury excluded, and the court further allows such arresting officer to testify as to having then questioned the accused about a "suspected" murder and other criminal offenses having no relation to the case on trial and with which the accused was never charged, is this a denial of the right of due process under the Fourteenth Amendment and to remain silent, under the Fifth Amendment, the jury having thereby been permitted to "try" the accused for a multitude of offenses with which he was not charged and allowed to consider his silence as to the offense with which he was charged, as related to the jury by the arresting officer, not once, but on several occasions, during the course of the trial, resulting in an excessively long sentence (20 years) as imposed by the jury?

(3). Where the accused elects not to testify, in a criminal case, and the trial court, near the end of the trial, comments, in substance, that he has seen no legal evidence on the part of the defense, or words to that effect and meaning and refuses to retract such comment, on objection being made, all in the presence of the trial jury, and in addition, the trial judge interrupts the closing argument of the defendant's attorney, to such an extent as to totally destroy any effect the same might have had on the jury, is this a denial of the right of due process under the Fourteenth Amendment and to remain silent under the Fifth Amendment, where the jury could not help but be extremely prejudiced by the comment by the trial court that the defendant had offered no legal evidence and that there was nothing that could be said in the defense attorney's argument that was proper for the jury to consider in arriving at its verdict, as a result of which the defendant is found guilty and extremely long penitentiary confinement (20 years), imposed by the jury?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V

"No person shall . . . . . be compelled in any criminal case to be a witness against himself, nor be de-

prived of life, liberty . . . . . without due process of law. . . ."

Amendment VI

"In all criminal prosecutions, the accused shall . . . . . be informed of the nature and cause of the accusation; . . . . . be confronted with the witnesses against him; and to have the assistance of counsel for his defense."

Amendment XIV

"Section I. . . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Code of Alabama, 1940

"Title 15, Section 307: A conviction of felony cannot be had on the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and such corroborative evidence if it merely shows the commission of the offense or the circumstances thereof, is not sufficient."

"Title 14, Section 398: Any person who has carnal knowledge of any girl under twelve years of age, or abuses such girl in the attempt to have carnal knowledge of her, shall, on conviction, be punished, at the discretion of the jury, either by death or by imprisonment in the penitentiary for not less than ten years."

STATEMENT OF THE CASE

Unless this Court will review the trial of this petitioner, he is faced with twenty (20) years confinement in the penitentiary for doing no more than patronizing a prostitute. He was tried in the Circuit Court of Montgomery County, Alabama, on a one-count indictment charging him with carnal knowledge of a girl under twelve years of age. The defendant entered a plea of not guilty. The jury found him guilty and fixed the punishment at twenty years imprisonment. On direct examination of the prosecutrix, the State proved that she had collected the sum of $10.00 for each act of sexual intercourse with the defendant. At page 34 of the Record, the State stipulated that the intercourse was voluntary. The relationship had continued for some time. Record 24-26. The Alabama Court of Criminal Appeals noted, at the outset of its opinion:

> "The charge grew out of an investigation of the murder of a prostitute in Montgomery which uncovered a ring of young black prostitutes patronized mostly by middle-aged white men."

QUESTION NO. 1

The first objection was made by the trial judge, (page 28 of the Record) when the following had transpired, on cross-examination:

"Q. Now have you been in juvenile reformatory out there?

"A. Yes.

"Q. When did you get in there?

"A. I got in there—I'd say about—around about October.

"Q. What did they put you in there for?

"A. Prostitute.

"Q. Prostitution?

"A. Yes.

"Q. And how long have you been prostituting?

The Court: "Wait a minute. Take the jury in the jury room."

(After the jury retires)

The Court: "Under the law, you can't bring in that testimony.

Mr. Fuller (Defendant's Attorney): "Yes, Sir."

(The court refused to re-consider, discussion appears at pages 28-34 Record)

(After jury was returned to court room, Record 34)

The Court: "Ladies and gentlemen of the jury, one of the questions asked was: 'What was the defendant (prosecutrix) put in juvenile detention for'? and the answer was 'prostitution'. I'll ask the jury to erase that from their minds and not to consider that answer in determining their ver-

dict. That's on motion of the State, and you except, is that right?"

Mr. Fuller: "Yes, Sir."

The following jury charge was refused by the trial court, as were all other jury charges requested by the defendant: (Record 5)

"4. The Court charges the jury that if you believe from the evidence that the witness Mary Croom voluntarily consented to the sexual intercourse with the defendant, for hire, as a prostitute, and that such witness had previously been engaged in performing sexual acts, as a prostitute, then you may determine from the evidence, that said Mary Croom was an accomplice of the defendant and in such event, under the law of this state, there cannot be a conviction of the defendant on the uncorroborated testimony of said Mary Croom."

Mary Croom, of course, was the prosecutrix. The trial court ruled throughout the trial that nothing could be done in behalf of the defendant to show that she was a prostitute and refused to allow any mention of the prostitution in the closing argument of defendant's attorney. Record 113-116.

At page 7 of its opinion, the Alabama Court of Criminal Appeals held, as follows:

> "Throughout the course of the trial, counsel for appellant insisted that the eleven-year-old girl, with whom appellant was charged with having sexual relations, was a prostitute. He contended she consented to the sex acts and sold her favors. Likewise, he continued to stress the fact that she made no complaint. . . . . The trial court repeatedly attempted to limit such immaterial and improper evidence, arguments and cross-examination.
>
> Opinion, Appendix 7.

Question No. 2

In holding that the *Miranda* decision of the Supreme Court, (*Miranda v. Arizona*, 384 U S 436, 16 L Ed 2d 694, 86 S Ct 1602, 10 ALR 3rd 974) had been fully complied with by the trial court in this case, the Alabama Court quoted to some extent from the

testimony of the arresting officer, at pages 4-6 of its opinion, but failed to mention the following, as occurred at page 76 of the Record:

> (Cross-examination of arresting officer, out of presence of jury, Record, 76)
>
> "Q. And when you asked him about the carnal knowledge cases, he then said he wanted a lawyer; is that right?
>
> "A. Yes, Sir, that's right.
>
> Mr. Fuller: "I don't believe that's admissible, Your Honor. I object.
>
> Mr. Thomas (District Attorney): "Your Honor, the State would say that he was freely talking with him; and when he asked him about the carnal knowledge cases, he said when asked if he knew those girls out there—Mary Croom was one of them—he said, 'I know a couple of them. They have been in my car, but I don't want to talk about that any more. I want my lawyer.' So, before he said he wanted 'my lawyer', he made that statement.
>
> Mr. Fuller: "He's charged with carnal knowledge of one girl. Here you are bringing him into (in)numerable others that he's not charged with, prejudicing this man's rights. If we're going to try him on one case, we ought to stick to this case, I think.
>
> Record 77
>
> The Court: "I think it would be admissible up to that point. He was read his *so-called Miranda* rights. He was not threatened, etc."

The Appellate Court *did* quote, but held there was no error in the following going before the jury: Opinion, page 6:

The District Attorney: "Q. . . . . And then what was the end of the conversation; what did he say then?

> "A. Then the conversation shifted to the dead girl; and then after we had interviewed him about that, ". . . . . we asked him about the girls in particular that he had went out with for the purpose of sex. And he said he would rather not talk to us about that, that he wanted his lawyer."

Mr. Fuller: "I ask that that be excluded, Your Honor.

The Court: "I think that's admissible. He said he told him any time he wanted to stop and wanted a lawyer, he could have one; and he said he wanted his lawyer, and the detective stopped. Overruled, overrule the objection.

Record 84.

Mr. Fuller: "We except."

The Alabama Court of Criminal Appeals, in Item IV of its opinion, page 6, held there was no error on the part of the trial court in the above, adding at the bottom of that page:

> "The answer dealt with a partially inculpatory statement given the witness by appellant. Proper predicates were laid as to a *Miranda* warning and as to voluntariness, and absent objections specifying grounds of inadmissibility, the trial court could not be put in error for refusing to exclude the answer."

(Entire opinion in Appendix)

QUESTION No. 3

Near the end of the trial, in which the defendant elected not to testify, the trial court, without provocation, saw fit to make a comment to the effect that the petitioner had not presented any "legal" evidence. The comment was made in the presence of the jury. On objection, the court added: "All right object to it and I'll overrule the objection". Record 98. The Alabama Court of Criminal Appeals, at pages 7 and 8 of the opinion sought to be reviewed, concluded:

> ". . . . . We note here that the Appellant presented no evidence, during the course of the trial. No witnesses were called for the defense and counsel for the appellant only engaged in cross-examination of the State's witnesses to elicit any testimony at all."
>
> (adding at page 10 of the opinion):
>
> "We believe the trial judge, while showing some impatience, was attempting to exercise his rightful control over the proceeding by moving the testimony expeditiously along."

The Alabama Court of Criminal Appeals failed to make mention of the trial court's continuous interruption of defendant's attorney's attempted closing argument, although properly raised on the appeal. Record 113-116.

REASONS FOR GRANTING THE WRIT
QUESTION No. 1

The petitioner was tried for what is a capital offense, in Alabama, carnal knowledge of a girl under age 12. State law, Title 15, Section 307, required corroboration of her testimony, if she was an accomplice, regardless of her age, 11, at the time of the alleged offense. The State had elicited from the prosecutrix, on direct examination, that she had been paid the sum of $10.00 for each act of intercourse, but on cross-examination the trial judge summarily cut-off all questioning as to her being a prostitute and confined in juvenile detention for prostitution, after she had admitted that she was a prostitute and was confined as such, in juvenile detention. The court ruled out her admissions and instructed the jury to disregard the same, although necessary evidence as to her being an accomplice. If she was an accomplice, under Alabama law, the defendant could not be convicted unless her testimony was corroborated. The trial court followed the same ruling throughout the trial, refusing to give the jury instruction requested by the defendant as to the effect of lack of corroboration of the testimony of an accomplice, as set out in the preceding Statement of the Case.

In Item I, page 2 of the opinion sought to be reviewed, the Alabama Court of Criminal Appeals held that it made no difference if the prosecutrix was an admitted prostitute, because of her age, no corroboration was required and in Item V of its opinion, page 7, that cross-examination as to her prostitution was properly denied.

Chief Justice Burger's conclusion in the case of *Davis v. Alaska*, 39 L Ed 2d 347, 415 US 308, 94 S Ct 1105, is most applicable, here:

> "It would be difficult to conceive of a situation more clearly illustrating the need for cross-examination.
>
> "The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him. This right is secured for defendants in state as well as federal criminal proceedings under *Pointer v. Texas*, 380 U S 400, 13 L Ed 2d 923, 85 S Ct 1065 . . . . . ".

In *Turner v. Louisiana*, 379 U S 466, 13 L Ed 2d 424, 85 S Ct 546, this Court held that there must be "full judicial protection of the defendant's right of confrontation, of cross-examination and of counsel." To the same effect is *Brookhart v. Janis*, 384 U S 1, 16 L Ed 2d 314, 86 S Ct 1245.

In *Douglas v. Alabama*, 380 U S 415, 13 L Ed 2d 934, 85 S Ct 1074, the Supreme Court held that the right of confrontation is not complied with, when a statement of an accomplice is admitted in evidence, and the accomplice does not testify, and that the point is reserved by one timely objection, without continuous interruption being necessary.

QUESTION No. 2

In Item IV, pages 4-6, of its opinion, the Alabama Court of Criminal Appeals quoted to some extent from the testimony of the arresting officer, as indicating the Constitutional rights of the petitioner, under the *Miranda* decision (Miranda v. Arizona, 384 U S 436, 16 L Ed 694, 86 S Ct 1602, 10 ALR 3rd 974), were not violated, page 6:

> "Q. (District Attorney): . . . . . And then what was the end of the conversation; what did he say then?
>
> "A. Then the conversation shifted to the dead girl; and then after we had interviewed him about that, we asked him about the girls in particular that he had went out with for the purpose of sex. And he said that he would rather not talk to us about that, that he wanted his lawyer.
>
> "Mr. Fuller: I ask that that be excluded, Your Honor.
>
> "The Court: I think that's admissible. He said he told him any time he wanted to stop and wanted a lawyer, he could have one; and he said he wanted his lawyer, and the detective stopped. Overruled, overrule the objection.
>
> "Mr. Fuller: We except."

Record 84.

The Alabama Court of Criminal Appeals: "The answer dealt with a partially inculpatory statement given the witness by appellant. Proper predicates were laid as to a *Miranda* warning and as to voluntariness, absent objections specifying grounds of inadmissibility, the trial court could not be put in error for failing to exclude the answer."

Opinion 6-7

Is it necessary to anticipate the answer to an apparently proper question and to object before the answer is given? If so, the prejudicial effect of the above should have been sufficient for the trial court to have excluded the answer of its own motion, it being of the most prejudicial nature and in no way related to the case on trial, under any stretch of the imagination, as well as a comment on the defendant's refusal to make a statement as to the charge made against him and for which he was supposedly being tried.

Surely the Supreme Court did not intend for the *Miranda* decision to become a "club" to be used on every defendant who refuses to make a statement to the arresting officer and elects to remain silent at his trial. The Alabama Court of Criminal Appeals, in the present decision, appears to so hold, however, in affirming the trial court's ruling, as quoted on the preceding page, and similar ruling, quoted at page 5 of the opinion of the Alabama Court of Criminal Appeals:

> (Police officer) "A. Yes, sir. We quit asking him questions, yes sir. He told us he didn't mind talking about the murder, but he didn't want to talk about the other."
>
> "The Court: I think it would be admissible up to that point. He was read his rights, *so called* miranda rights. . . . . and then stopped and said he would rather have a lawyer."

Record 77

It is submitted that the foregoing rulings by the Alabama Court of Criminal Appeals are contrary to the Sixth Amendment, particularly the following portion thereof:

> "In all criminal prosecutions, the accused shall . . . . . be informed of the nature and cause of the accusation . . . . ."

In holding the above to be proper to go before the jury, the trial court and the Alabama Court of Criminal Appeals make it possible for the accused to be tried on multiple charges, even though the indictment contains only one count and only one charge.

It is obvious from the above that the petitioner refused to discuss the one charge made against him until he could consult an attorney, his silence was thus used against him, over and over, again, contrary to the decision of the Supreme Court in the case of *United States v. Hale,* 45 L Ed 2d 99:

> "Admission of evidence of silence at the time of arrest has a significant potential for prejudice in that, the jury may assign much more weight to the defendant's previous silence than is warranted. . . . ."

QUESTION No. 3

Near the end of the trial, in which the defendant elected not to testify, the trial court made the following comment, in the presence of the jury; quoted at pages 7-8 of the opinion sought to be reviewed:

Record 98

> (the following occurred after the District Attorney had announced to the jury that the defendant had been indicted by the grand jury and objection was made, accordingly)
>
> "The Court: All right. Indicted by the grand jury is not testimony, and it is a form of getting the matter before the court. It has also the complaint and everything else, so let's proceed with something that's legal, Mr. Fuller, please.
>
> "Mr. Fuller: Well, that's what I'm trying to do, Your Honor.
>
> "The Court: Well, I haven't seen any evidence of it yet. So let's get on with the case.
>
> "Mr. Fuller: I would like to object to Your Honor's statement.
>
> "The Court: All right. Object to it, and I'll overrule your objection, but please get on with the case."

Now this trial, including jury selection, had begun at about 10:30 A M, lasting until 4:30 P M, on the first day, and until 12:00, noon, on the second day, including jury deliberation, verdict and sentencing. It was a capital case under Alabama law, and was certainly not unduly prolonged.

The same type of criticism was continually injected by the trial court into the closing argument of the defendant's attorney, to such an extent as to totally destroy any effect it might have had on the jury. Record 113-116.

The Alabama Court of Criminal appeals, at page 10 of its opinion held:

> "We believe the trial judge in the instant case, while showing some impatience, was attempting to exercise his rightful control over the proceeding by moving the testimony expeditiously along. Two of the judge's statements to counsel were supplemented with the word 'please'."

Appendix 10.

The Fifth and Fourteenth Amendments are poorly served, if the above actions by the trial court constitute "due process of law." The Supreme Court in *Griffin v. California,* 380 U S 609, 14 L Ed 2d 106, 85 S Ct 1229, held that the Fifth Amendment applies to state as well as federal trials.

CONCLUSION

It is respectfully submitted that the questions raised in this petition are of a substantial nature and relate to the Constitutional rights of every person accused of a criminal offense, to be accorded due process of law and not to be "victimized" for electing to remain silent while undergoing custodial interrogation as to the charge made and at the trial of the case in the court. The right to cross-examine the prosecuting witness should not, as was done here, be denied as to vital matters of defense; the trial court should not, under any circumstances, permit the arresting officer to testify as to his "suspicions" of other criminal charges that the accused might be guilty of, as was done here. The trial court should not be allowed to "brow-beat" defense counsel under the guise of "moving the proceedings expeditiously along", particularly in a capital case, with the death penalty about to be restored in Alabama and many other states, else there will be no need for accused persons to have attorneys, either employed or appointed.

The Premises considered, the petitioner prays the Supreme Court to issue the Writ of Certiorari to the Alabama Court of Criminal Appeals, in order that the opinion in this case may be reviewed

and revised, in accordance with the Constitutional provisions referred to in this petition and interpretations thereof by the Supreme Court.

Respectfully submitted,
Wm. J. Fuller Jr.
WM. J. FULLER, JR.,
Attorney for Petitioner,
242 Washington Street,
Montgomery, Alabama, 36104.

CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that I have served a copy of the foregoing petition on the Attorney General of the State of Alabama, by personally leaving a copy of the same with a responsible person in his office, prior to filing in the Supreme Court.

This 7th day of October, 1975.

Wm. J. Fuller Jr.
Attorney for Petitioner

Appendix

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P. O. BOX 351
MONTGOMERY 36101

AUBREY M. CATER, JR.
PRESIDING JUDGE
JOHN C. TYSON III
JOHN O. HARRIS
JOHN P. DeCARLO
JOHN S. BOOKOUT
JUDGES

MOLLIE JORDAN
CLERK

August 7, 1975

3rd Div. 335 Bernard Ino Butler v. State
Montgomery Circuit Court #9584

The following order has been entered in the above styled cause:

August 7, 1975. It is ordered that a ninety day stay of judgment be granted to allow the appellant to file petition for certiorari in the Supreme Court of the United States.

I, Mollie Jordan, Clerk of the Court of Criminal Appeals, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.
Witness my hand this 22 day of Aug. 1975.

Mollie Jordan
Court of Criminal Appeals of Alabama

(a)

JULY 31, 1975

THE STATE OF ALABAMA - - - - - - - - - - - - - - - - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

SPECIAL TERM 1975

SC 1355

EX PARTE: BERNARD INO BUTLER
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(RE: BERNARD INO BUTLER V. STATE)

The Petition for Writ of Certiorari to the Court of Criminal Appeals being duly submitted to this Court, it is CONSIDERED AND ORDERED that the petition be denied, at the costs of the petitioner, for which costs let execution issue.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.
Witness my hand this 4 day of Aug 1975

J. O. Sentell
Clerk, Supreme Court of Alabama

(b)

May 27, 1975

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1974-75

3 Div. 335

Bernard Ino Butler

v.

State

Appeal from Montgomery Circuit Court

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed.

(c)

MAR 21 1975

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1974-75

3 Div. 335

Bernard Ino Butler

v

State

Appeal from Montgomery Circuit Court

BOOKOUT, JUDGE

Carnal knowledge of a girl under age twelve. Sentence: 20 years.

The charge grew out of an investigation of the murder of a prostitute in Montgomery which uncovered a ring of young black prostitutes patronized mostly by middle-aged white men.

The prosecutrix, at the time of the offense was eleven years of age. She testified to having sexual relations with the appellant on fifteen or sixteen occasions. She said Butler would ride through the area where she lived, pick her up, and on two or three occasions took her to a local "rooming house" where the acts took place. The prosecutrix stated that the appellant paid the owner of the house $5.00 and gave her $10.00, and took her home.

A twenty-year-old prostitute called "Mut" testified that she accompanied the appellant and the prosecutrix to the rooming house on three occasions and saw Butler and the eleven-year-old prosecutrix enter one of the rooms. The owner of the house testified that the appellant Butler brought the prosecutrix and "Mut" to his place and had paid him for a room.

Detective Cunningham of the Montgomery Police Department testified as to the circumstances leading up to the arrest of Butler and his interrogation. The appellant called no witnesses on his behalf. There was no motion to exclude the State's evidence when the State rested its case in chief.

There was no exception to the trial court's oral charge. A motion for a new trial was duly filed and overruled by the court below.

I

It is contended by counsel for the appellant that the prosecutrix was an accomplice of the appellant and could not be convicted on her uncorroborated testimony. We do not agree with that argument. The prosecutrix was an eleven-year-old girl. Even if she was an admitted prostitute, the prohibition of Title 14, § 398, Code of Alabama 1940, is absolute. A girl under the age of twelve cannot consent to carnal knowledge and neither can she be an accomplice to such criminal conduct.

The Alabama Supreme Court held in Noble v. State, 253 Ala. 519, 45 So. 2d 857 (1950):

> "The first contention is that since the act was with her consent, she was an accomplice and, therefore, that defendant could not be convicted on her uncorroborated testimony on the authority of Denton v. State, 17 Ala.App. 309, 85 So. 41; section 307, Title 15, Code. That was on a charge of incest in connection with a woman over the age of consent. But when it is as to an offense in connection with a girl under the age of consent, she cannot be an accomplice, and the rule has no application. Duncan v. State, 20 Ala.App. 209, 101 So. 472."

II

Appellant's counsel complains that the court allowed Detective Cunningham to testify as to what the appellant told him on interrogation and refused to make the witness produce notes in his office file concerning the interrogation. Appellant contends the court erred in holding that the best evidence was the testimony of the officer and not notes he made in reference to his interrogation.

The State in fact produced the file in question which was reviewed out of the presence of the jury and the notes were shown to have been made by another detective and not by the witness himself. Nevertheless the court allowed counsel for the appellant to cross examine Officer Cunningham from the portion of those notes having reference to the carnal knowledge case. The remainder not allowed dealt with the murder investigation. We find no error on the part of the trial court in this instance as the appellant received the notes he requested and used them on cross examination. Likewise, the notes were not used to refresh the witness' recollection while testifying and thus the appellant had no right to their production in the first instance. Robinson v. State, 49 Ala. App. 511, 273 So. 2d 487 (1973).

Part of the appellant's motion for new trial sets out, as Exhibit A, a November 1, 1973, article from the Montgomery Advertiser concerning the discovery of a prostitution ring in Montgomery. Appellant in effect claims the article prevented him from getting a fair trial on March 21, 1974.

Prejudicial pre-trial publicity may be a ground for change of venue. The proper method of bringing this to the attention of the trial court is by filing a sworn application for change of venue with the trial court pursuant to Title 15, § 267, Code of Alabama 1940. This matter was improperly raised for the first time in a motion for new trial and not by sworn application in compliance with § 267, supra. Cook v. State, 269 Ala. 646, 115 So. 2d 101 (1959); Byers v. State, 105 Ala. 31, 16 So. 716 (1894); Kelly v. State, 160 Ala. 48, 49 So. 535 (1909). Also see, Acoff v. State, 50 Ala. App. 206, 278 So. 2d 210 (1973).

IV

Out of the presence of the jury, a predicate was laid by the State to introduce any statement into evidence made by the appellant to Detective Cunningham during interrogation. The evidence shows appellant was properly apprised of his Miranda rights and that his statements were voluntarily given. The Assistant District Attorney then asked the witness if the appellant admitted knowing any of the girls he saw at the police station. The prosecutrix was one of the group present there just before the appellant was questioned. The following then transpired:

> "A. Well, I took him back in the -- one of the rooms, and we began to interrogate him in reference to the murder.
>
> "Q. Um hum.
>
> "A. And we asked him did he know the girls that were sitting outside.
>
> . . . .

"A. And he admitted that he knew some of the girls, yes, sir.

"Q. Did he ever admit anything about them being in his car?

"A. He admitted that one or two of them had been in his car, but he didn't specify and never would and said he would rather not talk about that.

"Q. All right. And after that, he told you he wanted a lawyer, and you all quit asking him questions?

"A. Yes, sir. We quit asking him questions, yes, sir. He told us that he didn't mind talking about the murder, but he didn't want to talk about the other."

On cross examination, still out of the presence of the jury, the court stated:

"I think it would be admissible up to that point. He was read his rights, so-called miranda rights. He was not threatened or offered any reward or hope of reward. And he was asked more or less preliminary questions, asked if he knew any of those girls and if any of the girls had been in his car; and he answered affirmatively to both of them, and then stopped and said he would rather have a lawyer."

The jury was returned to the courtroom, the predicates were again laid and the following later transpired during Detective Cunningham's testimony:

"Q. All right. Now, you asked him if he knew those girls?

"A. Yes, sir.

"Q. All right. And what was his answer?

"A. He said he knew some of them---

"MR. FULLER: I object, Your Honor, to this question. I don't want to interrupt, but I would like to have an objection to each answer.

"THE COURT: Overruled.

"Q. (By Mr. Thomas) Now, what was his answer?

"A. He knew some of them.

"Q. All right. Did he say anything else about the car, anything else?

"A. We asked him had he ever been out with any of these girls, and he said, 'No.' And then we asked him about them being in his car and being with him, and he said some of them had, one or two of them had, I believe he said.

"Q. When you asked him if any of them had ever been in his car, he said, 'One or two of them had.' And then what was the end of the conversation; what did he say then?

"A. Then the conversation shifted to the dead girl; and then after we had interviewed him about that, we asked him about the girls in particular that he had went out with for the purpose of sex. And he said that he would rather not talk to us about that, that he wanted his lawyer.

"MR. FULLER: I ask that that be excluded, Your Honor.

"THE COURT: I think that's admissible. He said he told him any time he wanted to stop and wanted a lawyer, he could have one; and he said he wanted his lawyer, and the detective stopped. Overruled, overrule the objection.

"MR. FULLER: We except."

The first objection, above, came after the answer was given, was general in nature and, therefore, the trial court could not err in overruling it. Lucky v. State, 50 Ala. App. 324, 278 So. 2d 772 (1973). After the last answer, quoted above, counsel for the appellant merely asked that it be excluded. No objection was made prior to the answer and no ground for the motion to exclude was given. Miller v. State, 48 Ala. App. 28, 261 So. 2d 447, cert. denied 288 Ala. 746, 261 So. 2d 451 (1972); Ayers v. State, 48 Ala. App. 743, 267 So. 2d 533 (1972).

The answer dealt with a partially inculpatory statement given the witness by appellant. Proper predicates were laid as to a Miranda warning and as to voluntariness, and absent objections specifying grounds of inadmissibility, the trial court could not be

put in error for refusing to exclude the answer.

V

Throughout the course of the trial, counsel for appellant insisted that the eleven-year-old girl, with whom appellant was charged with having sexual relations, was a prostitute. He contended she consented to the sex acts and sold her favors. Likewise, he continued to stress the fact that she made no complaint. Counsel for appellant was apparently attempting to try the carnal knowledge charge as if it were a charge of rape. The trial court repeatedly attempted to limit such immaterial and improper evidence, arguments and cross-examination.

The trial court at one point excused the jury and entertained extended argument from appellant relative to those issues. The court then held that consent is immaterial in a case of carnal knowledge of a girl under the age of twelve. Nevertheless, appellant's attorney continued to go into the matter of the girl being a prostitute, receiving money, and her willingness to engage in sexual acts. On cross examining Detective Cunningham, near the end of the trial, he again went into the question of whether she made a complaint, whereupon the following occurred:

> "Q. Now, that wasn't the complaint then. She just made the statement to you that she had had sex relations with Colonel Butler?
>
> "A. It would be a complaint, because it is a violation of the law, Mr. Fuller.
>
> "MR. THOMAS: Your Honor, we would object to this line of testimony. He has been indicted by the Montgomery County Grand Jury.
>
> "MR. FULLER: I object to that statement and ask that it be excluded from this jury.
>
> "THE COURT: All right. Indicted by the grand jury is not testimony, and it is a form of getting the matter before the court. It has also the

> complaint and everything else, so let's proceed with something that's legal, Mr. Fuller, please.
>
> "MR. FULLER: Well, that's what I'm trying to do, Your Honor.
>
> "THE COURT: Well, I haven't seen any evidence of it yet. So let's get on with the case.
>
> "MR. FULLER: I would like to object to Your Honor's statement.
>
> "THE COURT: All right. Object to it, and I'll overrule your objection, but please get on with the case."

Appellant contends the remarks of the trial judge had the effect of accusing the appellant of having presented no legal "evidence." We note here that the appellant presented no evidence during the course of the trial. No witnesses were called for the defense and counsel for appellant only engaged in cross examination of the State's witnesses to elicit any testimony at all.

The appellant cites several authorities in his brief for the proposition that the trial court's remarks were prejudicial and thus reversible. Dennison v. State, 17 Ala. App. 674, 88 So. 221 (1921), sets forth a correct statement of the law in this regard, which has often been cited and quoted in similar cases. However, Judge Bricken, after eloquently stating the law, did not find the action of the trial judge to constitute reversible error in that case.

There, as here, a controversy between the court and counsel was resolved out of the presence of the jury. After the jury returned, the controversy was renewed and the trial court then criticized the defense counsel, directed him to quit talking so much, to resume his seat, and to proceed with the trial of the case.

We find many cases which do not support the appellant's contention. In Watson v. State, 155 Ala. 9, 46 So. 362 (1908), the Alabama Supreme Court held it was not prejudicial for the trial court to have instructed a witness that, "you need not answer that

question," and then say to defense counsel:

> "'I do not like to hear as intelligent counsel as represents the defendant ask such a question. They know, or should know, that the mere fact that the witness has been indicted for an assault with intent to murder in no way impeaches such witness, and such evidence is not relevant'...."

No error was committed by the trial judge in Myers v. Town of Guntersville, 21 Ala. App. 559, 110 So. 52 (1926) by admonishing and rebuking defense counsel by saying:

> "...You have asked that enough; you just want to drag them around from first one thing to another."

In Doss v. State, 224 Ala. 90, 139 So. 290 (1932), the following conduct was held to be merely expediting the trial and in no manner calculated to control the jury in its consideration of the weight to be given the evidence:

> "The Court: 'I want you gentlemen to finish this case.'
>
> "Mr. Prosch: 'We are doing the best we can.'
>
> "The Court: 'I am going to make you do it. I am not going totell you you can do the best you can. I am not going to keep this jury here waiting two or three days on a case that ought to be tried in a few hours.'"

Our Supreme Court found no error on the part of the trial judge for stating that the defense had shown no insanity and telling defense counsel, "'... Some of the questions you are asking her, I can't conceive, to save my life, what bearing they have on the question of insanity'...." Siebold v. State, 287 Ala. 549, 253 So. 2d 302 (1970).

The trial court in Vaughn v. State, 236 Ala. 442, 183 So. 428, was not held to be in error for telling the defense counsel, "I don't want to hear from you any more on that subject;" for ordering counsel to sit down; for voluntarily again stating to counsel not to go further into a matter; and for later threatening

counsel with punishment if he did not stop going into that subject.

The Court in Vaughn found the trial judge's statements showed some impatience but found such conduct to be understandable and excusable in light of the fact that defense counsel had repeatedly interposed objections without merit and attempted to go into particulars of wholly collateral matters which had been prohibited by the court's prior rulings. The Supreme Court found that defense counsel pursued dilatory tactics and persisted with many matters of little consequence, well calculated to try the patience of the trial judge.

We believe the trial judge in the instant case, while showing some impatience, was attempting to exercise his rightful control over the proceeding by moving the testimony expeditiously along. Two of the judge's statements to counsel were supplemented with the word "please." It appears the trial judge was only prodding counsel along to move from a matter not relevant to a carnal knowledge case, on to something relevant or "legal." In light of the above cited authorities, we are unwilling to hold that the trial court abused its discretion in exercising its control over the conduct of the trial by use of the language complained of by appellant. Dolvin v. State, 51 Ala. App. 540, 287 So. 2d 250 (1973).

VI

The appellant's requested charges 1, 2, 3, 4 and 6 were properly refused. Such charges are not correct statements of the law relative to the offense charged under Title 14, § 398, Code of Alabama 1940, as each charge would tend to mislead the jury to the wrongful conclusion that the crime of carnal knowledge could not be committed if the girl under the age of twelve consented. Noble v. State, supra.

Requested charges 5, 7, 8 and 10 were substantially and

adequately covered in the trial court's oral charge. Requested charge 9 was an affirmative charge with hypothesis and was properly refused as the State presented a prima facie case upon which the jury could make a finding of guilt. Morrow v. State, 52 Ala. App. 145, 290 So. 2d 209, cert. denied 292 Ala. 743, 290 So. 2d 213.

We have searched the record for error prejudicial to the appellant and find none.

AFFIRMED.

All the Judges concur.

June 17, 1975

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1974-75

3 Div. 335

Bernard Ino Butler

v.

State

Appeal from Montgomery Circuit Court

IT IS ORDERED that the application for rehearing be and the same is hereby overruled.

STATE OF ALABAMA)
)
MONTGOMERY COUNTY)

I, Mollie Jordan, Clerk of the Court of Criminal Appeals, do hereby certify that the foregoing pages contain a full, true and correct copy of the judgment entry, opinion of the Court, and the order overruling the application for rehearing in the cause of Bernard Ino Butler v. State of Alabama, 3 Div. 335, as the same appear and remain of record and on file in this office.

WITNESS, Mollie Jordan, Clerk of the Court of Criminal Appeals, this 8th day August, 1975.

Mollie Jordan
Clerk of the Court of Criminal Appeals of Alabama